Supreme Court, U.S.
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No. 01-688

IN THE
Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
Petitioner,

v.

URSULA GIBSON, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

After two rounds of briefing, it is clear that this case raises two unanswered federal questions that are recurring in nature and that long have preoccupied the lower courts. The Court, as the petition showed, has previously granted review of the first question — whether *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), survived passage of 28 U.S.C. § 1367 — but ultimately affirmed the decision by an evenly divided court. *See Free v. Abbott Labs., Inc.*, 529 U.S. 333 (2000). And both questions, the petition showed, have prompted an unusual number of lower-court decisions, concern matters of pressing importance to the everyday workings of the state and federal courts, and have generated a form and volume of wasteful litigation that only this Court can cure. Since the filing of the petition, the Chamber of Commerce of the United States of America and the Products Liability Advisory Council — both of which filed *amicus* briefs in *Free* — have filed briefs *amici curiae* echoing each of these points and offering other reasons for granting the writ as well.

Respondents understandably take a different tack. But, in doing so, they do not contest the importance of the questions presented or the significance of the lower-court debate over the meaning of section 1367. The arguments that they do make ultimately misapprehend the grounds of the Ninth Circuit's decision, inexplicably ignore the inter-circuit split regarding the Ninth Circuit's distinction between named and unnamed class members, and fail to appreciate that resolution of the continuing vitality of *Zahn* is advanced (rather than undermined) by considering a case that involves unnamed claimants who satisfy the jurisdictional minimum. For these reasons, those set forth in the petition, and those elaborated below, DaimlerChrysler respectfully submits that the issue warrants the Court's immediate attention.

1. At no point do respondents raise any jurisdictional impediments to reviewing the questions presented. A final, appealable order is in place, and there is no independent and adequate state ground precluding review.

2. Respondents also conspicuously fail to dispute several arguments raised in the petition (Pet. 13-15, 20-22, 25), and seconded in the two *amicus* briefs — namely, that the questions presented are important, that they have generated a remarkable volume of lower-court litigation, and that the general non-appealability of remand orders impedes Supreme Court resolution of these essential jurisdictional issues.

3. Respondents primarily oppose certiorari on vehicle grounds. Whether considered singly or together, however, these arguments miss the mark.

a. Respondents initially suggest (Opp. 1) that both questions arise in a "peculiar procedural posture" because the case comes to the Court in the context of a challenge to an attorney-fee award. Yet they offer no explanation why the procedural status of the case will impede review, and in truth no such argument exists. Before addressing each question presented, the court of appeals squarely held that "review of a fee award under section 1447(c) must include a de novo examination of whether the remand order was legally correct." Pet. App. 6a (quotation omitted). Respondents did not challenge this standard of review below and they have not challenged it since. And today, they acknowledge (Opp. 2) that the Ninth Circuit upheld the fee award because it concluded that "the removal had been *improper*." (Emphasis added.) On this record, the fact that the issues arise through review of an attorney-fee award is legally and practically beside the point. The standard of review is the same either way. In other words, to the extent respondents mean to argue that the setting of the case will hinder review, they are simply wrong: The manner in which the Ninth Circuit resolved the issues necessarily (and helpfully) isolates them for further de novo review.

As the petition points out (Pet. 15), moreover, it will frequently be the case that review of remand/removal issues arises in procedurally unorthodox settings. One need look no further than *Free* and *Zahn* to illustrate the point. *Free* came to the Court after no less than three trips to the Fifth Circuit. *See* 176 F.3d 298 (5th Cir. 1999); 164 F.3d 270 (5th Cir. 1999); 51 F.3d 524 (5th Cir.), *reh'g denied*, 65 F.3d 33 (5th Cir. 1995). And *Zahn* itself came to the Court in the absence of any noted circuit split at all. What was true in *Free* and *Zahn* is true today: In this unique context, both issues are ripe for review and warrant the Court's time.

b. Also mistaken is respondents' second vehicle argument, which focuses on whether the Ninth Circuit *necessarily* decided that section 1367 overrules *Zahn*. Claiming that the Ninth Circuit ruled for DaimlerChrysler on the *Zahn* question and against it on the named/unnamed distinction, they maintain (Opp. 2) that the decision accordingly was not "based on the court's resolution of the *Zahn* issue" and that the survival of *Zahn* will present only an "alternative ground" for affirmance. This argument first misapprehends the Ninth Circuit's decision, then misreads *Zahn* itself.

Any doubts about the centrality of the Ninth Circuit's resolution of the *Zahn* issue to the outcome in this case are removed merely by reading the lower court's decision. The analysis of this issue is not only extensive (Pet. App. 7a-19a) but also more extensive than most (if not all) other appellate decisions on the point. Add to this the Ninth Circuit's characterization of its decision as a "holding" (Pet. App. 19a; *accord* Pet. App. 8a ("[W]e . . . hold that *Zahn* is overruled by § 1367")), and it becomes clear that the *Zahn* issue was squarely presented, was definitively decided, and constitutes binding precedent in the Ninth Circuit. It thus is plainly eligible for further review.

But this amounts to a mere debater's point in comparison to the second flaw in this argument. Not only is it incorrect to say (Opp. 2) that resolution of the *Zahn* issue was "unnecessary to its holding," but it is incorrect to suggest that this was even a realistic possibility. Assume, consistent with respondents' theory, that the Ninth Circuit had tried to affirm solely on the basis of the named/unnamed party distinction — which is to say, that it had rejected DaimlerChrysler's argument exclusively on the ground that the only plaintiffs satisfying the jurisdictional minimum were unnamed claimants and that the compensatory-damages claims of these individuals are of no moment in ascertaining whether supplemental jurisdiction exists under section 1367. That holding would not have been reached without also considering whether *Zahn* survived the passage of section 1367. Why? In *Zahn* itself, each of the named class representatives satisfied the jurisdictional minimum, 414 U.S. at 291-92, meaning that the *Zahn* rule — that all members of a class must satisfy the jurisdictional minimum — necessarily turned on the relevance of the claims of unnamed class members. Otherwise, *Zahn* would have come out differently and would have upheld jurisdiction over the class in that case. Indeed, were respondents' vehicle arguments correct, it would follow (implausibly) that the *Zahn* facts presented an inadequate vehicle for announcing the *Zahn* rule itself. Under these circumstances, the court of appeals did not have the option of ruling against DaimlerChrysler solely on the basis of the distinction between named and unnamed class members, which presumably is why it looked at both questions together and why it gave such thorough consideration to the *Zahn* issue at the outset.

c. That leaves one final vehicle question that is left unstated but remains implicit in respondents' argument. Even if the Ninth Circuit meant to resolve the *Zahn* issue as a holding binding within the circuit and even if the court was required to do so in order to reach its conclusion about named and unnamed claimants, does it follow that *this* Court would

realistically and practically need to address the continuing vitality of *Zahn* in the context of this case? The answer is yes.

This case squarely implicates the *Zahn* issue for the same reason that it was implicated in the court of appeals. That is because there are only two ways to analyze the issue and both of them implicate the vitality of *Zahn*. First approach: Look initially at whether section 1367 overrules *Zahn*; if it does, proceed (as the Ninth Circuit did) to the named/unnamed issue; if it does not, then plaintiffs prevail on the first question presented. Second approach: Look initially at whether the compensatory-damages claims of unnamed plaintiffs are relevant to the jurisdictional inquiry; but, in doing that, the Court would need to confront the argument that *if Zahn* remains good law, it follows that the claims of unnamed plaintiffs *are* relevant to the jurisdictional inquiry. Under either approach, as the Ninth Circuit recognized, one cannot fairly answer the first question presented in this case without considering the vitality of *Zahn*. In the final analysis, then, by arguing that the jurisdictionally sufficient claims of unnamed class members make this case a weak vehicle for resolving the *Zahn* question, respondents get the issue exactly backwards: These facts not only present an adequate vehicle for resolving this question, *see* Pet. App. 20a (accepting DaimlerChyrsler's allegation that "several unnamed class members have claims for amounts in excess of $75,000"), but they may well present a superior vehicle for doing so.

4. In addition to presenting a fact pattern that squarely asks whether *Zahn* survives section 1367, the first question presented also implicates a division of lower-court authority. At the same time respondents argue (Opp. 5) that "petitioner cites not one federal case at any level that supports its position that supplemental jurisdiction may be invoked to support federal jurisdiction over an uncertified class action in which the named plaintiffs do not satisfy the amount-in-controversy requirement," they conspicuously offer no response to the portion of the petition that does that very thing.

Wholly apart from the unchallenged circuit split regarding the general applicability of section 1367, the petition showed (Pet. 11-12) that the lower courts have issued conflicting decisions about whether an overruling of *Zahn* covers cases where unnamed class members, but not named plaintiffs, satisfy the jurisdictional minimum. The petition maintained (Pet. 12) that the Eleventh Circuit "expressly disagreed with the Ninth Circuit's distinction between named and unnamed class members in the context of supplemental jurisdiction under section 1367" in *Morrison v. Allstate Indemnity Co.*, 228 F.3d 1255 (11th Cir. 2000), and noted that *Chiartas v. Bavarian Motor Works AG*, 106 F. Supp. 2d 872, 874 (S.D.W. Va. 2000), ruled likewise. *See also, e.g.*, *Olden v. LaFarge Corp.*, 203 F.R.D. 254, 264-65 (E.D. Mich. 2001) (holding "that 28 U.S.C. § 1367 confers on the Court subject matter jurisdiction over claims by putative class members which do not entail $75,000 in controversy but which form part of the same case or controversy as claims by *other class members* which exceed the jurisdictional amount" (emphasis added)). These cases *directly* support DaimlerChrysler's lower-court conflict allegations, and respondents' utter failure to acknowledge, let alone address, them only confirms the absence of any colorable ground for opposing review.

5. Respondents next oppose (Opp. 5-7) review of the punitive-damages question on the ground that no lower-court "disarray" exists over the question. In the first place, the remarkable pattern of push-me-pull-me decisions from the Fifth and Eleventh Circuits illustrates that the lower courts are anything but certain about how to resolve this issue. *See* Pet. 20-21. In the second place, the continuing pattern of district-court decisions in circuits that have not addressed the question illustrates that the lower courts are hardly falling into line when it comes to answering this question. *See* Pet. 22. And in the third place, no meaningful explanation exists for allowing the issue to continue to percolate any longer. Seven courts of appeals now have issued decisions on point, the decisions do

not approach the problem from the same analytical perspective, and the decision they each try to interpret (*Snyder v. Harris*, 394 U.S. 332 (1969)) has not been elaborated in 32 years and has not been interpreted since several amendments to the relevant federal statutes and rules.

Nor do respondents meaningfully counter the interconnection of this issue with the *Zahn* question. As the petition demonstrated (Pet. 23), the Ninth Circuit believed that the claims of unnamed class members could be considered for punitive-damages purposes but not for compensatory-damages purposes when considering whether the amount-in-controversy threshold had been satisfied. Both approaches cannot simultaneously be correct, and it confirms the strength of the petition that it presents an opportunity to consider both issues at the same time. Proving the point, respondents' principal answer to the first question presented is to make a legal argument — namely, that the claims of unnamed parties never matter in determining the amount in controversy — that confirms all seven courts of appeal (including the Ninth Circuit here) have gotten the punitive-damages inquiry wrong. For it will invariably be the case (and it was certainly the case here) that a punitive damages claim will push the amount in controversy over $75,000 per named plaintiff, whether the punitive damages are aggregated or allocated to each named party.

6. Respondents' brief defense (Opp. 7-8) of the Ninth Circuit's decision on the punitive-damages issue does not overcome this weakness. All that they note is that *individual* punitive awards are not treated as "common and undivided" under *Snyder v. Harris*, 394 U.S. 332 (1969), but that of course does not control how such claims should be treated in the class-action context, as the extensive lower-court decisions on the point illustrate. And the footnoted claim (Opp. 6 n.*) that "petitioner has not established that punitive damages claims are 'common and undivided'" under California law is belied by, and ignores, that very showing in the petition. *See* Pet. 23-24.

The claim at any rate is irrelevant given the nature of the Ninth Circuit's ruling, which was to announce a blanket *federal* prohibition against the aggregation of punitive damages, regardless of the underlying State law.

7. Respondents next argue (Opp. 8) that "the Ninth Circuit did not address any questions about the scope of discovery." But the petition did not raise discovery issues as an independent ground for review. Rather, DaimlerChrysler demonstrated (Pet. 26-28) that resolution of the questions that *are* presented in this case would have the salutary effect of providing much needed guidance in this confused area. *See generally Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001) ("If the jurisdictional amount is not facially apparent from the complaint, the court should look to the notice of removal and may require evidence relevant to the amount in controversy at the time the case was removed."). Respondents offer no response to this argument.

8. The *amicus* briefs, like the briefs filed by the same parties in *Free*, bolster each of these points, and more. Both briefs detail the practical importance of the issues in this case, the widespread number of situations in which they arise, the difficulty of obtaining appellate review of these issues and the compelling need to prevent forum shopping by parties eager to take advantage of favorable circuit precedent covering one State but not another. In word and deed, the *amici* briefs demonstrate that the issues raised in the petition are squarely presented and urgently demand the Court's attention.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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